

## **BEFORE THE COUNCIL OF THE VILLAGE OF CANAL WINCHESTER**

In re Appeal of Rockford Homes  
Rockford Homes Canal Crossing  
Application No. SDP-08-07  
Findings of Fact and Conclusions of Law

This appeal is before Council pursuant to Chapters 1147 and 1173 of the Codified Ordinances and concerns the Planning and Zoning Commission's November 12, 2008 failure to approve Rockford Homes's Application No. SDP-08-07. Having considered all matters of record and the arguments of Rockford Homes's attorney and representative, Council makes the following findings of fact and conclusions of law.

### **I. FINDINGS OF FACT**

#### **A. Procedural background**

1. On August 28, 1990, the Village of Canal Winchester amended its zoning map by changing the zoning for certain property from Residential (R-2) to Planned Unit Development (PUD). The rezoned property was directly associated with the Villages of Westchester development. Council approved the zoning change with thirty-two Staff recommended conditions. These conditions established the Development Standard Text for the PUD. Council relied upon and used the 1981 zoning code to make this amendment because it was in effect. The 9.112 acres at the center of the instant appeal are included in the property that was rezoned from R-2 to PUD. See Ordinance 59-90.

2. On April 2, 2001, pursuant to the landowner's request, Council amended the 1990 PUD Plan and Development Text for the Village of Westchester development by designating as open space 11.06 acres that previously had been designated for multi-

family use and designating an 11.06 acre portion of a larger tract from single-family residential development to multi-family use. The proposed Rockford Homes Canal Crossing development is located in the 11.06 acre multi-family use area, as amended by Council in April 2001. Council approved the 2001 zoning amendment "subject to certain conditions beyond the original conditions of approval set forth in an exhibit to Ordinance 59-90." These "certain conditions" supplemented the original Development Text. See Ordinance 17-01.

3. On August 20, 2001, Council amended Codified Ordinance Chapter 1173.06. These amendments remain in effect.

4. In February 2003, the Planning and Zoning Commission approved Rockford Homes's Plan for a 112-unit multi-family apartment development in the Village of Westchester known as Canal Crossing. The Planning and Zoning Commission also approved Rockford Homes's Plan for a 60-unit multi-family condominium development in the Village of Westchester known as Eagle Ridge. Rockford Homes constructed and developed Eagle Ridge. Rockford Homes did not construct and develop Canal Crossing.

5. In December 2005, Rockford Homes requested to amend its Preliminary Plan and Development Text for the Village of Westchester by changing Canal Crossing from a 112-unit multi-family apartment development to 48-unit multi-family condominium development. The Planning and Zoning Commission approved the amendment on December 12, 2005. Rockford Homes acknowledges "[t]he plan was approved[,] but the condominiums were not built. The plan has now lapsed." See Rockford Homes's Memorandum in support, received December 10, 2008, at p.2.

6. On October 10, 2008, Rockford Homes submitted an Application for Site Development Plan. With its application, Rockford Homes once again desired to amend the previously approved PUD Preliminary Plan and Development Text for the Village of Westchester development. With its 2008 Application, Rockford Homes requested to develop Canal Crossing as a 112-unit apartment development rather than the 48-unit condominium development. Rockford Homes did not submit a new Preliminary Plan and Development Standards Text, pursuant to Codified Ordinance 1173.06(a) for the Planning and Zoning Commission's review the Council's approval. Instead, Rockford Homes submitted only an Application for Site Development Plan and a "Final Site Plan." See Application No. SDP-08-07.

7. On November 10, 2008, the Planning and Zoning Commission held a meeting to review Rockford Homes's application. Rather than consider Application No. SDP-08-07 a combined preliminary site plan / development plan / development standards text modification under Codified Ordinance 1173.06(a) and (b), Planning and Zoning Commission member Mr. Wynkoop made a motion to approve Application No. SDP-08-07. Mr. Graber seconded the motion, but it failed unanimously.

8. Rockford Homes appealed the Planning and Zoning Commission's failure to approve Application No. SDP-08-07. On December 15, 2008, Council held a Public Hearing on the appeal. Rockford Homes's attorney and representative argued in favor of the application. Of the many residents who filled Council Chambers on December 15<sup>th</sup>, thirteen residents spoke out against the application. All the remaining residents agreed with the comments made by their fellow residents. Rockford Homes urges Council to

“reverse the decision of the Planning Commission and approve the Development Plan.”

See Rockford Homes’s Memorandum in support, received December 10, 2008, at p.5.

## II. CONCLUSIONS OF LAW

1. Rockford Homes maintains that its property already has been zoned PUD, and therefore, Village Council now is acting administratively. Council is not persuaded. The Planning and Zoning Commission should have considered Application No. SDP-08-07 a new combined preliminary site plan / development plan / development standards text under Codified Ordinance 1173.06(a) and (b) that required Council’s approval. In the alternative, Application No. SDP-08-07 is an amendment to the previously approved PUD development in that it would change Canal Crossing from a 48-unit condominium development into a 112-unit apartment development. Ohio law clearly provides that not only does the creation of a PUD constitute legislative action, but the approval of an application to amend a previously approved PUD also constitute legislative action.

2. The test for determining whether the action of a legislative body is legislative or administrative is whether the action taken is one enacting a law, ordinance, or regulation or is an action executing or administering a law, ordinance or regulation already in existence. *Donnelly v. Fairview Park* (1968), 13 Ohio St.2d 1, at ¶ 2 of the syllabus.

3. “The overall zoning classification in a PUD area can be termed ‘nominal’ because it does not by itself, indicate the specific zoning restrictions on the area. These restrictions are ascertainable only by referring to the approved plats for the development.” *Gray v. Trustees, Moncolva Twp.* (1974), 38 Ohio St.2d 310, 314 n. 4. Upon approval,

the Preliminary Plan becomes part of the zoning regulations; “that is, the developer must, unless an amendment is granted, comply with these plans.” *Id.* The action of council “in approving such a plat is the functional equivalent of a traditional legislative zoning, even though the entire PUD area is covered by the same ‘nominal’ zoning classification both before and after the approval of the plat.” *Id.* at 314.

4. Under certain circumstances even the “implementation of a PUD, as well as its creation, is a legislative act.” See *State ex rel Crossman Communities of Ohio Inc. v. Greene Cty. Bd. of Elections* (1999), 87 Ohio St.3d 132, 136 – 137; see also *State ex rel. Zonders v. Delaware Cty. Bd. of Elections* (1994), 69 Ohio St.3d 5, 11. The approval of a final development plan also constitutes a legislative action because it implements a PUD, even if such implementation occurs at a separate time and in a separate action. *Id.* Similarly, “the approval \* \* \* of an application to amend a previously approved PUD plat is equivalent to a legislative rezoning, even though there is no change in the nominal zoning.” *Gray v. Trustees, Moncolva Twp.* (1974), 39 Ohio St.2d at 314

5. Rockford Homes acknowledges Application No. SDP-08-07 is governed by Codified Ordinance Chapter 1173. See Rockford Homes’s Memorandum in support, received December 10, 2008, at pp. 1, 3, and 4. Rockford Homes also admits its Preliminary Plan and Development Text that changed Canal Crossing from a 112-unit multi-family apartment development to 48-unit multi-family condominium development “has now lapsed” because the condominiums were never built. If true, logic dictates Rockford Homes’s 2003 Plan for a 112-unit multi-family apartment development also has lapsed. Therefore, at the time Rockford Homes submitted Application No. SDP-08-

07, it no longer had a Preliminary Plan and Development Text incorporated into the zoning text for Canal Crossing at the Village of Westchester, even if nominally classified as PUD. Application No. SDP-08-07, therefore, serves as a new Preliminary Plan, Development Plan, and Development Text for Canal Crossing.

6. Pursuant to Codified Ordinance 1173.06(a)(3), the Planning and Zoning Commission should have forwarded its recommendation to Council rather than vote to approve Application No. SDP-08-07. Given the motion to approve was unanimously defeated, it is reasonable to assume the Planning and Zoning Commission would have recommended Council not approve Rockford Homes's application, had it followed Codified Ordinance 1173.06(a)(3).

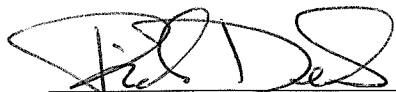
7. Assuming Rockford Homes's Preliminary and Development Plans for Canal Crossing is no longer effective, as it suggests, Rockford Homes is seeking the implementation of the PUD, through its Final Site Plan for Canal Crossing. Rockford Homes's Application and Final Site Plan, therefore, is an amalgamation of a new Preliminary Plan, Development Plan, and Development Text, for Canal Crossing to be developed as a 112-unit multi-family apartment development. Having not previously reviewed Rockford Homes's new plan, it must act upon the Planning and Zoning Commission's apparent recommendation. Therefore, Council takes legislative action and **DISAPPROVES** Application No. SDP-08-07.

8. To the extent Rockford Homes's 2005 Preliminary Plan and Development Text for Canal Crossing still is effective, Application No. SDP-08-07 is not an amalgamation of a new Preliminary Plan, Development Plan, and Development Text for Canal Crossing. Instead, it is Rockford Homes's request to amend the previously

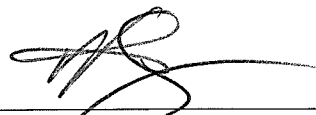
approved PUD Plan and Development Text. Such an amendment would convert Canal Crossing from a 48-unit multi-family condominium development into a 112-unit multi-family apartment development. Council, therefore, takes legislative action and

**DISAPPROVES** Application No. SDP-08-07.

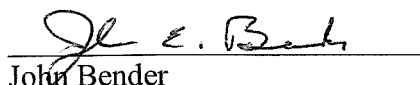
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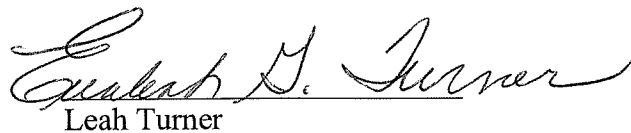
Rick Deeds, President of Council



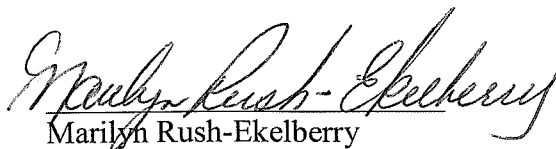
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